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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CLAMP-ALL CORPORATION,

Petitioner,

v.

CAST IRON SOIL PIPE INSTITUTE, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

Respondents, the defendants below, are the national trade association of cast iron soil pipe manufacturers and its members. The members of the respondent association sold identical hubless couplings that were used to join the hubless cast iron soil pipe and fittings they manufactured. Petitioner, the plaintiff below, is one of eight companies manufacturing a variety of hubless couplings that were also used to join respondents' hubless pipe and fittings. It was undisputed for purposes of the appeal below that the relevant market is the U.S. market for hubless couplings. Petitioner's case was dismissed at the close of plaintiff's evidence. The questions presented are:

1. Did the First Circuit deny petitioner's right to a jury trial by holding that a jury could not find that respondents unreasonably restrained trade in, attempted to monopolize and conspired to monopolize the U.S. hubless-coupling market in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §1 and §2, on the basis of petitioner's evidence that:

> (1) respondents conspired to issue and obtain industry-wide adoption of a national hubless-coupling standard that excluded couplings not manufactured by or for members of the respondent association under the association's patents;
>
> (2) respondents conspired with their suppliers to pack the hubless-coupling subcommittee of a private standard-setting organization to foreclose the adoption of a performance standard that would approve

hubless couplings solely on the basis of their ability to join hubless pipe and fittings;

(3) respondents conspired to advertise and promote the false claim that their hubless couplings are superior to competing couplings for use with their pipe and fittings; and

(4) respondents had the power to exclude competition from and control prices in the relevant market?

2. Was the First Circuit correct in holding that the exclusion of competing products from a private standard cannot be an unreasonable restraint of trade because, by reducing information costs or assuring product quality, the standard carries an overriding justification and the injury suffered by products excluded from the standard brings about the very benefits that the antitrust laws seek to promote?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below were petitioner, Clamp-All Corporation, and the respondents Cast Iron Soil Pipe Institute, Anaheim Foundry Company, Charlotte Pipe and Foundry Company, The Eastern Foundry Company, Jones Manufacturing Company, Inc. and United States Pipe and Foundry Company. The judgment below affirmed the trial court's dismissal of an additional party, American Brass & Iron Foundry, for lack of personal jurisdiction; this petition does not seek review of that ruling and American Brass & Iron Foundry is not named a respondent herein.

Petitioner, Clamp-All Corporation, has no parent companies, subsidiaries or affiliates to list pursuant to Rule 28.1.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner, Clamp-All Corporation ("Clamp-All"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on June 30, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the First Circuit is reported at 851 F.2d 478 and is reprinted in the appendix hereto at 1a. The order denying a petition for rehearing and suggestion for rehearing en banc is reprinted at 25a. The statement of the United States District Court for the District of Massachusetts (Zobel, D.J.) of reasons for dismissing the

action at the close of petitioner's evidence is reprinted at 27a.

JURISDICTION

Clamp-All invoked the jurisdiction of the district court under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §15 and §26, and 28 U.S.C. §1331 and §1337. The district court, which had ordered the separate trial of a counterclaim, entered final judgment on the complaint under FED. R. CIV. P. 54(b) on June 16, 1987. Clamp-All's timely Notice of Appeal was filed July 13, 1987.

The First Circuit entered a judgment and opinion affirming the district court on June 30, 1988. (1a.) A timely petition for rehearing, filed July 14, 1988, was denied on August 4, 1988. (25a.)

The jurisdiction of this Court to review the judgment of the First Circuit is invoked under 28 U.S.C. §1254(1).

STATUTES AT ISSUE

Section 1 of the Sherman Act, 15 U.S.C. §1, provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a cor-

> poration, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Section 2 of the Sherman Act, 15 U.S.C. §2, provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

STATEMENT OF THE CASE

Respondents are the Cast Iron Soil Pipe Institute ("CISPI") and its members.[1] CISPI is the national trade association of cast iron soil pipe foundries whose members manufacture hubless cast iron soil pipe and fittings.

Hubless cast iron soil pipe and fitings require hubless couplings to hold adjacent pieces together and seal the joint. When this action was brought, CISPI owned or controlled patents for a hubless coupling

[1] The complaint named CISPI and its eleven members as defendants. Three of the members were dismissed for lack of personal jurisdiction and three others settled prior to trial.

that had been sold by all CISPI members since the 1960's.[2] Petitioner Clamp-All is one of eight companies manufacturing different hubless couplings that are sold in competition with CISPI couplings for use with respondents' hubless pipe and fittings. The First Circuit opinion describes how Clamp-All couplings outperform CISPI couplings in certain respects. (3a.)

Count I of the complaint alleges that CISPI and its members have used their position as the U.S. cast iron soil pipe industry to restrain trade in the U.S. market for hubless couplings in violation of Section 1 of the Sherman Act. Count II alleges that respondents have attempted to monopolize and conspired to monopolize the hubless-coupling market in violation of Section 2. The complaint seeks damages and an injunction and demands trial by jury.

Respondents did not challenge on appeal below the holding of the trial court that the jury could find the relevant market to be the manufacture and sale of hubless couplings in the United States.[3]

The Trial Court Dismissed at the Close of Plaintiff's Evidence

The trial court dismissed both Sherman Act counts at the close of plaintiff's evidence. In affirming, the court of appeals held that a jury must not be permitted to consider the following evidence in the trial record:

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[2] The CISPI coupling patents expired after the action was brought.

[3] Trial transcript page 5-81 (cited hereinafter as, *e.g.*, tr. 5-81).

1. CISPI promulgated CISPI Designation:310, the industry standard for hubless couplings. Through the efforts of CISPI and its members, CISPI Designation:310 was adopted by other private standard-setting organizations as the only national standard for hubless couplings. Only hubless couplings manufactured by or for members of CISPI under patents owned or controlled by CISPI could be approved under CISPI Designation:310.[4]

2. The American Society of Sanitary Engineering ("ASSE") formed a subcommittee to adopt a hubless-coupling performance standard, *i.e.*, a standard that would approve hubless couplings solely on the basis of their ability to join hubless pipe and fittings and seal the joint. CISPI urged its members and their suppliers to become members of the subcommittee to prevent the adoption of the proposed performance standard. The CISPI group put forward a counter-proposal that had no performance criteria. CISPI, its members and their suppliers packed the subcommittee and voted the adoption of the CISPI counterproposal. By having the ASSE subcommittee adopt the CISPI counterproposal which was not a performance standard, the CISPI allies foreclosed the adoption of a performance standard.[5]

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[4] The following are parts of the record on appeal below containing petitioner's evidence referred to in the preceding paragraph: Tr. 2-58 thru 2-59, 5-21 thru 5-26, 5-67 thru 5-68; Ex. 1, Ex. 2, Ex. 55 pp. 3 thru 5, Ex. 84, Ex. 126 Vol. II, Ex. 130 Minutes of May 14, 1981 Att. C p. 39; P5 thru P14, U59 thru U60, U66 thru U69.

[5] Tr. 3-17 thru 3-24, 5-77, 6-21 thru 6-30, 6-85 thru 6-89, 6-101 thru 6-102, 7-94; Ex. 40, Exs. 65 thru 70, Ex. 72, Exs. 74 thru 76, Ex. 95, Ex. 97, Ex. 98, Ex. 107, Ex. 108, Ex. 130

3. All members of CISPI sell both their hubless cast iron soil pipe and fittings and their CISPI couplings under the same trademark, ℄ NO-HUB® That trademark is owned by CISPI and licensed only to CISPI members. CISPI and its members advertise and promote the use of ℄ NO-HUB® as a symbol of quality. CISPI members enjoy a competitive advantage because plumbing inspectors and purchasers rely on ℄ NO-HUB® as a symbol of acceptance of pipe, fittings and couplings like the UL® of Underwriters Laboratories. CISPI and its members advertise and promote their hubless pipe, fittings and couplings as a "system" and claim that Clamp-All and other competing couplings are not suitable for use in the ℄ NO-HUB® system.[6]

The claim that CISPI couplings are superior to other couplings for joining hubless cast iron soil pipe and fittings is false. Components of CISPI couplings continually fail to comply with CISPI Designation:310 because of quality problems caused by efforts to keep CISPI members' costs low. Davidson Laboratory of Stevens Institute of Technology conducted identical tests of Clamp-All and CISPI couplings to measure their ability to join hubless pipe and fittings and main-

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Minutes of September 26-27, 1979 p. 3 and Att. K, Minutes of November 28, 1979 Att. C p. 5, Minutes of May 8, 1980 Atts. B and F, Minutes of August 14, 1980 Atts. C and D, Ex. 131; U107 thru U109, U118 thru U119, V2-9 thru V2-11.

[6] Tr. 2-60, 2-77, Ex. 2 p. 1, Ex. 3 p. 1, Ex. 12, Ex. 13, Ex. 69, Ex. 93 Item 6, Ex. 119 p. 2, Ex. 123, Ex. 124 pp. A-344 thru A-504, Ex. 126 Vol. I p. xvii, Ex. 130 Minutes of November 28, 1979 Att. D p. 2, Minutes of May 14, 1981 Att. C pp. 1 and 35, Minutes of February 11, 1982 p. 6, Minutes of September 16, 1982 Att. H; H50 thru H53, N156 thru N158, T60, U79 thru U80, U100, U102 thru U103, X161 thru X162.

tain a satisfactory seal in typical plumbing installations. Clamp-All couplings passed the test; CISPI couplings failed.[7]

4. Because Massachusetts is the only state with a performance standard for hubless couplings, it is only in Massachusetts that Clamp-All and CISPI couplings compete on an equal basis with each other and with other hubless couplings. Clamp-All's economics expert analyzed the market behavior of Clamp-All and other hubless couplings as they compete successfully with CISPI couplings under the Massachusetts performance standard. That market behavior was compared with the less successful competition by Clamp-All and others with CISPI couplings outside of Massachusetts, where the only standard recognized is CISPI Designation:310. The economist also analyzed the pricing of hubless couplings in all states. Based on those analyses, Clamp-All's economist concluded that respondents have the power to exclude competition from and to control prices in the market for hubless couplings in the United States.[8]

REASONS FOR GRANTING THE WRIT

The decision of the court of appeals made two important changes in the law applicable to jury trials of antitrust actions. In one, the First Circuit adopted a presumption that the exclusion of competing prod-

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[7] Tr. 7-79 thru 7-91; Exs. 45 thru 51, Ex. 54, Ex. 67 p. 2, Exs. 78 thru 81, Ex. 93 Att. B p. 1, Ex. 103 p. 2, Ex. 110 p. 2; Ex. 130 Minutes of August 14, 1980 p. 5; V2-46, X61 thru X62.

[8] Tr. 2-51 thru 2-53, 2-58 thru 2-59, 3-68 thru 3-70, 5-113 thru 5-117, 11-57 thru 11-67, 11-81 thru 11-83, 11-87 thru 11-89.

ucts from a private standard cannot unreasonably restrain trade; here the court of appeals rewrote the rule of reason. In the other change, the First Circuit held that a jury would not be permitted to consider petitioner's evidence summarized in the text accompanying footnotes 4 through 8, *supra*; here the court of appeals decided factual issues and, in the process, redefined the roles of court and jury.

The First Circuit does not suggest that either of these changes is based on any precedent. Together, the changes threaten the continued effectiveness of the private action as a means for enforcing federal antitrust policy.[9]

I. EXCLUSION OF COMPETING PRODUCTS FROM PRIVATE STANDARDS IS HELD TO BE LAWFUL PER SE.

The First Circuit decision states a new rule of per se legality for private standards that exclude competing products. (14a-16a.) The rule is not based on any unique feature of CISPI Designation:310 or on the facts of this case. The reasoning of the decision would legalize any private standard that excludes competing products.

According to this decision, excluding competing products from a private standard cannot be an unreasonable restraint of trade because "[o]n its face" the standard saves money "by providing information to makers and to buyers less expensively and more effectively than without the standard. It may also help to assure product quality." (15a.) The injury to products excluded from the standard is not "unreasonably anticompetitive," because

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[9] *See Perma Life Mufflers v. International Parts Corp.*, 392 U.S. 134, 136 (1968).

> It brings about the very benefits that the antitrust laws seek to promote. That is to say, activity that harms competitors because it lowers production or distribution costs or provides a better product carries with it an overriding justification.

(15a.) The decision cites no authority for this new rule.[10]

Although the First Circuit claims to apply the rule of reason (12a-13a), it actually avoids rule-of-reason analysis—balancing anticompetitive evils against redeeming virtues[11]—by holding that excluding competing products from a private standard is not an anticompetitive evil, but a redeeming virtue which "brings about the very benefits that the antitrust laws seek to promote." Not only does the court avoid weighing injury to competition against benefits, it also avoids inquiring whether the benefits are real and whether they could be achieved by some less restrictive alternative.[12] Specifically, the court of appeals did not ask these basic questions raised by the rule of reason:

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[10] The court of appeals cited *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 508 F.2d 547, 558 and n.19 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975) (15a), but that case held only that a proprietary specification was not illegal per se.

[11] 7 P. AREEDA, ANTITRUST LAW ¶1502 (1986). *See*, also, Federal Trade Commission Rulemaking, *Standards and Certification*, Final Staff Report, pp. 252-261 (April 1983).

[12] *See* 7 P. AREEDA, ANTITRUST LAW ¶1505 (1986).

(1) Is there evidence that CISPI Designation:310 either lowers information costs or provides a better product?[13]

(2) If so, could the same result be achieved by another means less harmful to competition, such as a performance standard that does not exclude acceptable hubless couplings?

The First Circuit ignores the warning of *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 571 (1982), that private standard-setting "can be rife with opportunities for anticompetitive activity."[14] The decision also ignores the fact that one of the principal threats to competition posed by private standards is the exclusion of rival producers. *See Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. ___, 108 S.Ct. 1931, 1937 n.5 (1988).

In holding that the antitrust laws "promote" the exclusion of competing products from private standards, the decision turns the rule of reason on its head. This novel presumption of legality should not be imposed on such a critical area of antitrust concern without congressional action or the consideration and guidance of this Court.[15]

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[13] The evidence in this case is that industry-wide adoption of CISPI Designation:310 has discouraged CISPI members from improving the quality of CISPI couplings and increased users' information costs by limiting the availability of information about non-CISPI couplings.

[14] The First Circuit did not discuss or cite *Hydrolevel*, *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963) or *Associated Press v. United States*, 326 U.S. 1 (1945).

[15] *See Square D Co. v. Niagara Frontier Tarriff Bureau, Inc.*, 476 U.S. 409, 424 (1986).

II. THE FIRST CIRCUIT WOULD NOT LET THE JURY HEAR RELEVANT ADMISSIBLE EVIDENCE.

In reviewing the verdict directed against Clamp-All, the court of appeals was "bound to view the evidence in the light most favorable to [Clamp-All] and to give it the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn." *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 (1962) (footnote omitted). That is not the standard of review that was followed. Instead, the First Circuit made its own findings of fact as though it were trying the case de novo. Two examples illustrate the point:

FIRST, the court of appeals held there is no evidence from which a jury could find that CISPI packed the ASSE subcommitte (18a); the trial court had looked at the same record and held there *is* evidence from which the jury could find that defendants packed the subcommittee (30a).[16] The trial court's holding, which is not mentioned by the court of appeals, proves that the First Circuit did not view the evidence "in the light most favorable to" Clamp-All.

SECOND, Clamp-All contends that CISPI made its counterproposal to ASSE in an effort to block the adoption of an ASSE performance standard, which is shown by the fact that the counterproposal is not a performance standard. Clamp-All's evidence includes a warning by CISPI's General Counsel that the CISPI counterproposal "was not really a performance standard." The court of appeals dismissed that evidence, writing: "We do not see how that statement shows a significant abuse of ASSE's procedural standards

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[16] *See* Point II.B, *infra*.

or practices." (18a-19a.) But the issue should be whether a jury could find that respondents attempted to block ASSE's efforts to develop a performance standard on the basis of that statement and Clamp-All's other evidence, regardless of whether the court of appeals might draw a different inference.[17] It is respectfully submitted that the statement fairly supports the inference and should be considered by a jury.

Most troubling of all, however, is the fact that most of the evidence summarized in the text accompanying footnotes 4 through 8, *supra*, all of which had been admitted into the trial record and cited to the court on appeal below, was not discussed in the First Circuit decision. There is no way for this Court to know what reason, if any, the court of appeals had for refusing to let a jury consider the evidence it did not discuss.

A. The CISPI Counterproposal Was Not a Performance Standard.

The First Circuit held there is no evidence from which a jury could find that respondents "acted improperly" in having the ASSE subcommittee adopt the CISPI counterproposal. (16a-19a.) That holding ignores the fact that ASSE formed the subcommittee to develop a hubless-coupling performance standard that would approve all acceptable hubless couplings. The CISPI counterproposal was not a performance standard; it was proposed by CISPI to foreclose the adoption of a performance standard.

The best evidence of that is the CISPI counterproposal itself, which is reprinted in the appendix at

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[17] *See* Point II.A, *infra*.

34a.[18] The performance of a hubless coupling is measured by its ability to withstand water pressure when the plumbing system starts to fill as the result of system blockage or sewer backup. The CISPI counterproposal has no performance criteria; it specifies no pressure that a coupling must be able to withstand to be considered acceptable.[19] There are three pages of pressure test procedures (39a-41a), but not one word about test pressures. There is no way that a hubless coupling could be found capable of performing acceptably under the CISPI counterproposal, because the counterproposal does not say what acceptable performance is.[20]

The court of appeals would not permit a jury to read the CISPI counterproposal to see that it was prepared and submitted by defendants to block an ASSE performance standard. Nor would the court allow a jury to consider petitioner's evidence that:

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[18] The CISPI counterproposal is reprinted from trial Exhibit 131, the CISPI minutes of a meeting of CISPI members and non-member suppliers called by CISPI to plot strategy for the ASSE meeting at which the counterproposal was to be submitted to the subcommittee.

[19] The provision that hubless couplings are used in drainage systems operating "at pressures not in excess of the equivalent ± 1 inch water column" (36a) is a description, not a performance criterion. An engineer for a CISPI member testified that this provision could be met by two pieces of cast iron soil pipe held together with Scotch® tape. X-107 thru X-108. That testimony was excluded by the trial court.

[20] Instead of performance criteria, the CISPI counterproposal adopted by reference all other plumbing codes and specifications, which recognize CISPI Designation:310 as the only national hubless-coupling standard. (36a-37a.)

(i) CISPI's General Counsel warned that the CISPI counterproposal was "not really a performance standard;"[21]

(ii) the ASSE Standards Coordinator characterized the testing described in the CISPI counterproposal as "meaningless;"[22]

(iii) a CISPI supplier who had joined the ASSE subcommittee called the CISPI counterproposal "a non-entity as a specification;"[23] and

(iv) the Chairman of the ASSE subcommittee said that, with the adoption of the CISPI counterproposal the subcommittee action "was no longer a performance standard."[24]

B. Defendants Packed The ASSE Subcommittee.

The First Circuit held that CISPI did not violate the letter or spirit of ASSE's rules by presenting its counterproposal "and urging its members to attend the meeting." (19a.) The trial court, on the other hand, held the jury could find that defendants attempted to block the ASSE performance standard "by packing the subcommittee and by submitting their counterproposal." (30a.) The evidence makes clear that the trial court, rather than the court of appeals, read the record correctly.

The court of appeals based its holding on the erroneous assumption that CISPI had done nothing more than urge its members to join the ASSE hub-

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[21] Ex. 131 p. 4.

[22] Ex. 98 p. 2.

[23] Ex. 76 p. 2.

[24] *Id.*

less-coupling subcommittee. But CISPI is a cast iron soil pipe trade association, not a hubless-coupling trade association. Most CISPI members were not elligible to join the subcommittee because they did not manufacture the CISPI couplings they sold. CISPI urged its members *and their non-member suppliers* to join the subcommittee so that CISPI would have enough votes to exercise control. The meeting of the ASSE subcommittee that voted the adoption of the CISPI counterproposal had been packed by CISPI, its members and their non-member suppliers. That is exactly what was held to be an antitrust violation in *Indian Head, Inc. v. Allied Tube & Conduit Corp.*, 817 F.2d 938 (2d Cir. 1987), *aff'd*, 486 U.S. ___, 108 S.Ct. 1931 (1988).

C. Defendants Falsely Advertise And Promote CISPI Couplings.

The First Circuit decision does not question the relevance or materiality of petitioner's evidence discussed in the text accompanying footnotes 6 and 7, *supra*, that CISPI and its members falsely advertise and promote the claim that CISPI couplings are superior to competing couplings for use in the © NO-HUB® system. Except for dismissing as "sellers' talk" one of the many CISPI advertisements offered in evidence by petitioner (19a), the court of appeals suggests no reason why that evidence should not be considered by a jury.[25]

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[25] The First Circuit also found that the failure of CISPI couplings to pass the Davidson Laboratory test "did not show that CISPI's coupling was defective" (20a), thus substituting its own judgment for that of the country's leading plumbing test laboratory. But the decision does not question the fact that the test failure proves that respondents knew that their claim that CISPI couplings outperform other couplings is false.

D. Defendants Have Exercised Market Power.

The First Circuit holding that there is no evidence from which a jury could find defendants engaged in "exclusionary conduct" (22a) is also contradicted by the record. Clamp-All has 65% of the hubless-coupling market in Massachusetts, which has a performance standard. (4a.) In the rest of the country, where CISPI Designation:310 is the only recognized standard, sales of CISPI couplings have never been less than 14 times the sales of their nearest rival, Clamp-All.[26] That evidence shows that CISPI and its members have the power to exclude competing couplings from the national market and have exercised that power.[27]

Clamp-All's economist testified on the basis of his analyses of hubless-coupling market behavior that CISPI and its members have the power to control prices in and to exclude competition from the U.S. hubless-coupling market.[28] The trial court held that testimony to be both admissible and appropriate. (28a.) The court of appeals ignored that testimony and gave no reason why it should not be considered by a jury.

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[26] Tr. 12-51 thru 12-54; Ex. 120. Sales are measured in dollars. This evidence was excluded by the trial court as irrelevant, but its accuracy was not questioned.

[27] The First Circuit affirmed the trial court's refusal to admit evidence of precise market fingures, but gave no reason why precise market figures are needed where defendants have a large share of the relevant market and there is other evidence that they dominate the market. (3a-4a, 22a.) *See United States v. E.I. Du Pont de Nemours & Co.*, 118 F.Supp. 41, 197 (D. Del. 1953), *aff'd*, 351 U.S. 377 (1956); and 3 P. AREEDA & D. TURNER, ANTITRUST LAW ¶835c, p. 350 (1978).

[28] Tr. 11-87 thru 11-89.

CONCLUSION

The First Circuit failed to recognize the inherent conflict between calling this a "highly fact-based appeal" (2a) and holding that the facts must not be decided by a jury. This is not a case like *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), where the issue was whether a jury should be permitted to consider ambiguous evidence of conspiracy; there was no challenge on appeal below to the holding of the trial court that the jury "could find that there was a contract, combination, or conspiracy in the words of" Section 1 of the Sherman Act. (30a.) The First Circuit simply ignored *Continental Ore Co. v. Union Carbide & Carbon Corp.*, *supra*, which it did not cite, and invaded the province of the jury as the fact finder. If allowed to stand, this decision will give reviewing courts carte blanche to substitute their own findings for those of the jury in antitrust cases.

The First Circuit's presumption of legality for private standards that exclude competing products endorses the very type of anticompetitive standard-setting warned about in *Hydrolevel*, *supra*. If allowed to stand, this decison will severely affect competitors whose acceptable products are excluded from private standards and users who rely on private standards as objective guides to product suitability.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
For the First Circuit

No. 87-1697

CLAMP-ALL CORPORATION,

Plaintiff, Appellant,

v.

CAST IRON SOIL PIPE INSTITUTE, ET AL.,

Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Rya W. Zobel, U.S. District Judge]

Before Campbell, Chief Judge,
Breyer and Selya, Circuit Judges.

Richard S. Harrell with whom *Ronald E. Harding* and *Weston, Patrick, Willard & Redding, P.A.* were on brief for appellant.

John J. Curtin, Jr., with whom *William G. Southard, Jody E. Forchheimer, Eve Jacobs-Carnahan, Bingham, Dana & Gould, John M. Harrington, Jr., Thomas H. Hannigan, Jr., Ropes & Gray, Alan R. Hoffman, M. Eric Schoenberg, Lynch, Brewer, Hoffman & Sands, Mark W. Pearlstein, Goodwin, Procter & Hoar, Henry P. Sailer,*

Elizabeth Foote, *Covington & Burling*, *John F. Tener*, *Theodore Tucci* and *Robinson & Cole* were on brief for appellees.

Andrew M. Higgins and *Casner, Edwards & Roseman* on brief for appellee American Brass & Iron Foundry.

JUNE 30, 1988

BREYER, *Circuit Judge*. The plaintiff in this antitrust action, Clamp-All Corporation, sued the Cast Iron Soil Pipe Institute ("CISPI") and several of its members, charging that they had unlawfully restrained trade in (or monopolized or attempted to monopolize) the sale of hubless pipe couplings by means of improper pricing, improper behavior in respect to "quality-certification" provided by state and private organizations, and other improper trade practices. 15 U.S.C. §§ 1 & 2 (1982), 15 U.S.C. § 1125(a) (1982). The district court granted defendants' motion for summary judgment on the pricing (and certain other) counts, and, after hearing all the plaintiff's evidence, directed a verdict in defendants' favor; the plaintiff appeals. We have examined the lengthy record and conclude that the district court was correct. No reasonable jury could have found facts sufficient to show a violation of the antitrust laws. We therefore affirm the court's judgment.

I

To understand this highly fact-based appeal, one must keep in mind the following background:

1. Hubless couplings are used to join segments of pipe, such as water pipe or sewer pipe.

2. Several different manufacturers have made, and still make, various kinds of pipe couplings. The old fashioned

method of joining segments of pipe apparently was to make one end slightly larger than the other, and then to fit the small end of one segment into the large end of the other. The larger opening was called the "hub" and the smaller end the "spigot." We think they looked about like this:

[**DRAWING**]

The newer method of joining pipe segments keeps both ends the same size. A sleeve fits around the two ends to be joined and a metal band holds the sleeve in place.

3. CISPI is a trade association of *pipe* manufacturers, all of whom sell, and many of whom also make, a particular type of coupling known as a CISPI coupling. It consists of a simple sleeve of the sort described. It fits between lugs each placed a bit away from the end of each pipe segment (perhaps they help hold the sleeve in place). We think the CISPI coupling looks something like this:

[**DRAWING**]

CISPI introduced hubless couplings to the market in 1963. CISPI controlled the patent on its coupling until 1984, licensing CISPI members to make and sell it.

4. Clamp-All is one of several firms that make competing pipe couplings. The Clamp-All and CISPI couplings appear quite similar, but the list price of Clamp-All's coupling is typically four to five times that of CISPI's, and the Clamp-All coupling will outperform the CISPI coupling in certain respects: it is wider, which makes it more secure and enables it to withstand greater water pressure; it is made of more durable (and more expensive) materials; and it is somewhat easier to install.

5. Exactly what share of the total market for water pipe couplings (outside of Massachusetts) CISPI couplings account for is a matter in dispute. Everyone agrees that CISPI's share is large, but they agree, too, that several

companies other than Clamp-All and CISPI members sell a significant number of couplings. Inside Massachusetts, where Clamp-All had a monopoly for several years because only its coupling met the state's performance standard, Clamp-All controls about 65 percent of the coupling market.

Basically, Clamp-All charges that its relative lack of success outside Massachusetts is due to various anticompetitive (indeed, anti-Clamp-All) practices employed by CISPI members; otherwise, says Clamp-All, its sales record elsewhere would resemble its record in Massachusetts. The CISPI defendants deny all anti-competitive behavior; they add that Clamp-All's Massachusetts success reflects Clamp-All's own, partly successful, efforts to convince certifiers and regulators to keep the less expensive CISPI coupling out of the state.

Our concern here is with Clamp-All's charges, not CISPI's. We have proceeded to evaluate the legal merits of Clamp-All's many different claims as follows. First, we have read the record, marshalling the evidence in repect to each charge. Second, we have assumed a set of facts as favorable to Clamp-All, in respect to each charge, as the evidence will reasonably permit. *See Goldstein v. Kelleher*, 728 F.2d 32, 39 (1st Cir.), *cert. denied*, 469 U.S. 852 (1984). Third, we have determined, as a matter of law, *see* 2 P. Areeda & D. Turner, *Antitrust Law* §315b (1978) [hereafter Areeda & Turner], whether that version of the facts reveals a violation of the antitrust laws; whether, for example, it shows predatory pricing, *Matsushita Electric Industrial Co. v. Zenith Radio Corp.* 475 U.S. 574 (1986), or an "unreasonable restraint of trade," *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911).

We conclude that the facts do not show an antitrust violation. To explain our conclusions, we shall group Clamp-All's many charges into three categories: those concerning pricing practices, those concerning CISPI efforts to influ-

ence certification standards, and those concerning allegedly unreasonable marketing practices.

II

The significant evidence that we have found in respect to CISPI's pricing practices consists of the following:

1. The defendants published identical list prices for various products including couplings. One defendant testified that the prices on the list established a "defined differential" among different sizes of pipe, couplings, and related equipment.

2. Two CISPI firms, Tyler and American Brass & Iron Foundry ('AB&I'), firms that were defendants in this case initially, but which were no longer defendants at the time of trial, had price lists that showed "returns" to the firm to be less than "costs." To be more specific, the Tyler price list, in respect to "hubless couplings," showed in the column entitled "Return FOB Taylor" ".67," and in the column entitled "average unit cost," the figure ".78." In respect to AB&I's couplings, the evidence was conflicting. Although the category marked "Sales" was lower than that marked "Cost," the category marked "Unit Price" was *higher* than that marked "Unit Cost."

3. Two witnesses testified that Tyler's president once said at a CISPI meeting in 1981 that Tyler, the industry price leader, would not raise its prices until Central Foundry went out of business. A month later, Central Foundry did go out of business; Tyler then raised its prices, and the other CISPI members followed Tyler's lead.

4. Clamp-All's expert testified that CISPI members gave discounts on a geographical basis, which discounts did not reflect delivery cost dif-

> ferences, but, rather, reflected a "multiple basing point pricing scheme."

We conclude that this evidence does not show unlawfully low prices, prices that could hurt Clamp-All. Clamp-All comes closer to showing unreasonably high CISPI prices, but any such showing may reflect no more than an industry concentrated enough for each firm to set prices "interdependently" (each firm aware that competitors will quickly match price cuts may keep its prices high); and higher than competitive prices help Clamp-All rather than hurt it. *See Matsushita*, 475 U.S. at 583. We now consider each of Clamp-All's pricing claims in greater detail.

a. Clamp-All suggests that this evidence shows unlawful "predatory pricing." As we explained in detail in *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227 (1st Cir. 1983), however, "predatory pricing" occurs when a firm sets its prices temporarily below its costs, with the hope that the low price will drive a competitor out of business, after which the "predatory" firm will raise its prices so high that it will recoup its temporary losses and earn additional profit, all before new firms, attracted by the high prices, enter its market and force prices down. *Id.* at 232-35; *see Matsushita*, 475 U.S. at 588-95. We said that *ordinarily* the measure of a "predatory price" is price below "incremental cost." *Barry Wright*, 724 F.2d at 232-33. That is to say, the addition to total cost (to the firm) of producing and selling additional output would exceed the return from selling that additional output.

The evidence in the record is insufficient to show such pricing by defendants here. For one thing, the product price lists from Tyler and AB&I contain no explanation about what the numbers on them mean. Indeed, Tyler's list refers to a vast number of different products and contains many products in respect to which the number in the "NET FOB" column is lower than that in the "AVERAGE UNIT COST" column. Yet, the plaintiffs do not

argue that Tyler was pricing large numbers of its products, including such products as thumbscrews, seal gaskets, seal lubricants, plugs, and something called a "No-hub San Tee," at predatory levels. Perhaps the list shows that Tyler, like a hardware store owner, keeps records that allocate certain costs (such as rent or electricity) among related products proportionately, but then Tyler recovers different amounts of those costs from the sales of different products. (A hardware store owner does not set prices to recover precisely the same percentage of his rent from the sale of each bolt, garden tool, or lightbulb; rather, he sets prices so that he recovers the totality of his overhead from the totality of all his sales with different products likely making different contributions.) Be that as it may, we do not see how a jury could know, without more precise evidence or an explanation, what either Tyler's or AB&I's price lists show, nor do we see how it could rest a conclusion of "price below incremental cost" on a few such unexplained lists alone. Nor does plaintiff correct the evidentiary deficiency by pointing to Tyler's president's remark at the 1981 CISPI meeting, for that remark (and subsequent conduct) simply shows (at best) a price increase after the demise of a competitor; it does not significantly help show that the relevant prices were unlawfully low to begin with.

For another thing, neither Tyler nor AB&I were defendants at the time of trial. Thus, plaintiff had to use this price list evidence to show that *other* firms set prices below *their* incremental costs. The fact that hubless couplings were simple products with similar costs may tend to show that Tyler's and AB&I's cost/price ratios and defendants' were the same. But, the equally important facts that Tyler and AB&I made many related products; that many costs of producing these products were likely related (*e.g.*, shared overhead); that present defendants produced a *different* mix of products; and that each of their product by product cost relationships (*e.g.*, compar-

ative shares of overhead or other common costs) were therefore likely different from Tyler's and AB&I's, together make Tyler's and AB&I's price lists close to worthless as evidence that any of these *other* firms (the present defendants) priced couplings below its own incremental-costs. The district court correctly concluded that a jury could not find, without impermissible speculation, that these defendants priced couplings below their costs, whether defined as "incremental costs" or any other arguably appropriate cost measure.

b. Appellant, taking an opposite tack, next argues that identical price lists and testimony about a "defined differential" indicate an agreement among CISPI defendants to fix prices, presumably higher than competitive prices. (The defendants, selling identical products, would not need to *agree* to keep prices low; a price cut by any one of them would likely force the others to follow.) Of course, any such agreement, by keeping coupling prices *up*, would likely help the plaintiff not hurt it. *See Matsushita*, 475 U.S. at 583.

This is not to say that the evidence here would permit a jury to find any such agreement. Even if one assumes that the similar prices on the lists do not simply reflect ordinary forces of competition at work among firms selling virtually identical products, the price lists still show no more than what defendants concede: that each firm, acting individually, copied the price list of the industry leader. A firm in a concentrated industry typically has reason to decide (individually) to copy an industry leader. After all, a higher-than-leader's price might lead a customer to buy elsewhere, while a lower-than-leader's price might simply lead competitors to match the lower price, reducing profits for all. One does not need an agreement to bring about this kind of follow-the-leader effect in a concentrated industry. *See* 6 Areeda & Turner ¶¶ 1432-33. And, the fact that the CISPI firms often set prices that deviated from their price lists helps support the inference that the sim-

ilarity of price lists reflects *individual* decisions to copy, rather than any more formal pricing agreement.

Courts have noted that the Sherman Act prohibits *agreements*, and they have almost uniformly held, at least in the pricing area, that such individual pricing decisions (even when each firm rests its own decision upon its belief that competitors will do the same) do *not* constitute an unlawful agreement under section 1 of the Sherman Act. *See, e.g., Apex Oil Co. v. DiMauro*, 822 F.2d 247, 253-54 (2nd Cir. 1987); *North Carolina v. Chas. Pfizer & Co.*, 384 F. Supp. 265 (E.D.N.C. 1974), *aff'd*, 537 F.2d 67 (4th Cir.), *cert. denied*, 429 U.S. 870 (1976); 6 Areeda & Turner ¶ 1433; *cf. Aubin v. Fudala*, 782 F.2d 280, 286 (1st Cir. 1983) (similar analysis in criminal conspiracy context). That is not because such pricing is desirable (it is not), but because it is close to impossible to devise a judicially enforceable remedy for "interdependent" pricing. How does one order a firm to set its prices *without regard* to the likely reactions of its competitors? *See* 6 Areeda & Turner ¶¶ 1432-33; 3 Areeda & Turner ¶ 840. The district court pointed out that the evidence here, consisting of little more than the price lists, would not permit a finding of more than such individual, interdependent, price setting. We agree.

c. Appellant points to the testimony of its expert, who said that the price lists show an agreement to follow a "basing point" pricing scheme. Such a scheme essentially amounts to a device that could help a group of firms in a concentrated industry "police" interdependent pricing practices, practices that help them keep prices above competitive levels without the need for any formal price agreement. As just mentioned, in principle, each firm in such an industry may set its prices knowing that a price cut would be quickly matched by others; each would also know that stable high prices, maintained by all firms, would benefit all. But, the problem for such firms (at least in principle) is that each also knows that for it alone the best of all possible worlds is to attract customers through a

small price cut *not matched* by the others. Since *all* know this, how can they keep each other from cutting prices? How can they guarantee that industry prices stay high? How can they prevent the forces of competition from breaking out, with one or another firm yielding to the temptation to cut its own prices while hoping the others will *not match* the low price? Each firm realizes that any formal communication with its competitors about such matters could lead to antitrust prosecution and a finding of a traditional agreement. But each fears that, without such communication, its competitors will "chisel" on the tacit pricing arrangement, perhaps through secret or selective price cuts (which from the public's point of view should be encouraged). *See United States v. Container Corp. of America*, 393 U.S. 333 (1969).

In principle, "basing point pricing" is a practice that might help firms stop (what from the public's perspective would be desirable) "chiseling." It does so when firms in the industry typically sell many different, related products, in many different geographical markets, all at different prices, a fact that makes it that much more difficult for each firm to know whether its competitors may be "chiseling," say, by "swallowing" some of the freight costs. A "basing point" pricing system involves all firms charging identical freight cost (irrespective of plant location or actual freight costs) to any point in the United States. The "freight prices" charged are those that a railroad or trucker would set from a single, fixed location (say Chicago), not from where each plant is actually located. Such a system makes it far easier for each firm to know the "freight cost" that a competitor is "supposed" to charge its customers, thereby making it easier for each firm to detect whether a competitor is charging a particular customer a lower price for the product. To that extent, "basing point pricing" helps each firm detect "chiselers"; it lessens the fear of each that others may be "chiseling"; and it thereby helps them all maintain prices above com-

petitive levels. (It also tends to permit firms to release "safely" any "competitive impulse," by selling, at greater expense and with less profit, to more distant locations all without changing the apparent price of the product, thereby helping further reinforce the stability of an industry's "high price" practices.) For these reasons, "basing point pricing" systems have normally been found unlawful. *See* 6 Areeda & Turner ¶ 1435f; *Federal Trade Commission v. Cement Institute*, 333U.S.683 (1948). Indeed, in the case of "basing point pricing," unlike simple "interdependent price setting," agencies, believing they can devise an appropriate remedy, have forbidden the practices even when the firms adopt it "interdependently," without any traditional agreement (perhaps through gradual, tacit evolution in the industry). *See Triangle Conduit & Cable Co. v. Federal Trade Commission*, 168 F.2d 175 (7th Cir. 1948), *aff'd by an equally divided Court sub nom., Clayton Mark & Co. v. Federal Trade Commission*, 336 U.S. 956 (1949) (Federal Trade Commission held basing point pricing unlawful even though there was no *agreement*).

Our description of "basing point pricing," while simplified, is sufficient to show that the evils of the practice lie in its tendency to help firms keep prices high, not low. Thus, if such a practice existed in respect to couplings, it kept CISPI prices *high*, making it easier for Clamp-All to compete. Clamp-All cannot base its damage suit upon a scheme that *helps* it sell its product. *Matsushita*, 475 U.S. at 583.

d. Finally, Clamp-All adds together its first and second theories. It argues that the defendants behaved unlawfully by agreeing to charge high prices on some products, and then used the proceeds of their high price sales to finance below cost coupling prices. The short answer to this claim, however, is that the only important element here for a court to examine at the request of a competitor is the *low* price. If that price is unlawfully low, if, for example, it is a predatory price, it does not ordinarily matter whether

the money to pay for the resulting temporary loss comes from a bank account, a legacy, a lottery prize, or the proceeds of a price-fixing conspiracy in respect to another product; regardless of financing source, the practice would be unlawful. Where, however, as here, a plaintiff does not show that the low price is unlawfully low, there is no reason to believe the low price is not self sustaining, there is no reason to believe it requires 'external financing,' and there is no reason to believe that any "price fixing" on any other products has anything significant to do with the matter. *See Shore Gas and Oil Co. v. Humble Oil & Refining Co.*, 224 F. Supp. 922, 926-27 (D.N.J. 1963). We do not see how a dubious kind of "financing source" could, in and of itself, convert a lawful low price into an unlawful one.

III

We turn next to Clamp-All's claims that the CISPI defendants agreed to engage in certain unreasonably anticompetitive activities, in violation of Sherman Act § 1. In evaluating these claims, one must keep in mind the special antitrust meaning of the terms "reasonable" and "unreasonable," a meaning that draws its content from the basic objectives of antitrust law's "rule of reason." The Supreme Court adopted the "rule of reason" in order to provide an intellectually, administratively, and legally satisfactory way to limit the Sherman Act's broad language, which, if taken literally, might forbid all agreements, good and bad, that were in any sense at all "in restraint of trade." *See United States v. Trans-Missouri Freight Association*, 166 U.S. 290 (1897). Chief Justice White pointed out (with only slight exaggeration) that without some such limitation, the Sherman Act might be taken as forbidding virtually "every conceivable contract or combination . . . anywhere in the whole field of human activity." *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 60 (1911). The "rule of reason" limits the

Act's literal words by forbidding only those arrangements the anticompetitive consequences of which outweigh their legitimate business justifications, 7 Areeda & Turner ¶ 1500 at 362-63, though certain anticompetitive practices, such as price fixing, so typically lack justification as to be *per se* unreasonable. 7 Areeda & Turner ¶ 1509.

"Anticompetitive", too, has a special meaning. It refers not to actions that merely injure individual competitors, but rather to actions that harm the competitive process. *Brown Shoe Co. v. United States*, 370 U.S. 294, 319-20, 328-34 (1962); *see Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488-89 (1977). And, the law assesses both harms and benefits in light of the Act's basic objectives, the protection of a competitive process that brings to consumers the benefits of lower prices, better products, and more efficient production methods. *See Interface Group, Inc. v. Massachusetts Port Authority*, 816F.2d9, 11-12 (1st Cir. 1987); 7 Areeda & Turner ¶ 1502.

The joint practices and agreements that appellant attacks here are not *per se* unreasonable. Thus, appellant must show that the likely anticompetitive effects of these practices outweigh their business justifications, or at least that the defendants might achieve any legitimate business objectives in a significantly less restrictive way. 7 Areeda & Turner ¶ 1505b.

A

Clamp-All's major attack concerns CISPI's promulgation of a standard called the 310 Designation. That standard is entitled

> Specifications for
>
> CAST IRON SOIL PIPE INSTITUTE'S APPROVED COUPLING FOR USE IN CONNECTION WITH HUBLESS CAST IRON SOIL PIPE AND FITTINGS FOR SANITARY STORM DRAIN, WASTE AND VENT PIPING APPLICATIONS

The specification consists of several pages of detail. It also states,

> Several different types of hubless joints or couplings are available for use in hubless cast iron systems .... It is the purpose of this specification ... to furnish information as to the approved characteristics of one of such type couplings which is approved by the Institute [CISPI].

And, it states on the first page,

> Members of the Institute who are licensed to use the Institute's Collective Mark ℄ NO-HUB and who sell hubless couplings manufactured by or for them which conform fully to this Specification may indicate their membership in the Institute and their conformance with this Specification by marking such couplings with the Institute's Collective Mark ℄ NO-HUB.

CISPI successfully persuaded various private standard-setting bodies, as well as state and local plumbing code authorities, to make reference to the 310 Designation as the kind of coupling that would meet their respective standards.

a. Appellants seem to say that CISPI's very promulgation of this standard and its efforts to secure its adoption by certifying authorities amounts to an unreasonable restraint of trade. We do not see how that can be so. The standard, in specifying what counts as a CISPI coupling, provides a relatively cheap and effective way for a manufacturer or a buyer to determine whether a particular coupling is, in fact, (generically considered) a CISPI coupling. The adoption by certifiers helps users quickly and effectively determine that a particular coupling (which meets CISPI standards) also meets state, local, or private

certifiers' standards of acceptability. The *joint* specification development, promulgation, and adoption efforts would seem less expensive than having each member of CISPI make duplicative efforts. On its face, the joint development and promulgation of the specification would seem to save money by providing information to makers and to buyers less expensively and more effectively than without the standard. It may also help to assure product quality. If such activity, in and of itself, were to hurt Clamp-All by making it more difficult for Clamp-All to compete, Clamp-All would suffer injury only as a result of the defendants' joint efforts having lowered information costs or created a better product. *See George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 508 F.2d 547, 558 & n.19 (1st Cir. 1974). And, *that* kind of harm is not "unreasonably anticompetitive." It brings about the very benefits that the antitrust laws seek to promote. That is to say, activity that harms competitors because it lowers production or distribution costs or provides a better product carries with it an overriding justification.

Of course, what we have just written is true of 'legitimate' standard-setting activity. *See Whitten*, 508 F.2d at 558 n.19. There could be special circumstances, showing, in an individual case, that the standard setting at issue serves no legitimate purpose, or that it is unnecessarily harmful. *Id.* (antitrust claim stated if market participant who establishes proprietary specifications coerces a standard-setting organization or conspires with it to get the specification officially adopted, or if it prevents competitors from competing for approval). But the plaintiff would have to show the existence of such circumstances; and, the plaintiff has not done so here. The best it can do is point to the word "approved" in the specification ("it is the purpose of this specification . . . to furnish information as to the approved characteristics of one of such type couplings which is approved by the Institute.") and to argue that that single word might mislead users into think-

ing that CISPI is a disinterested certifying organization, providing "approvals" for all hubless couplings, thereby hurting Clamp-All, unless, as Clamp-All seems to argue, CISPI considered Clamp-All's coupling for "approval" as well, *see Radiant Burners, Inc. v. Peoples Gas Light & Coke*, 364 U.S. 656 (1961); 2 J. Von Kalinowski, *Antitrust Laws and Trade Regulation*, § 6I.01 (1988); Wachtel, "Products Standards and Certification Programs," 13 *Antitrust Bull.* 1, 13 (1968).

The dispositive answer to this argument is that the record contains no significant evidence that the word "approved" misled anyone. The specification itself makes clear what it is, a specification that applies to *CISPI-type* hubless couplings, not to *all* hubless couplings. It contains no other language that might make one think that CISPI was some kind of general certifying organization. Buyers of hubless couplings are builders, plumbers, or contractors—reasonably sophisticated users—and there is no testimony that any of them was fooled. Plaintiff's best evidence consists of a comment by its expert that "people who normally use these things . . . could easily be misled," but, on cross examination, that same expert conceded that he had not talked to normal coupling users in forming that particular opinion. In our view, that opinion alone, so lacking in foundation, cannot take the issue of "being fooled" to the jury. And, if CISPI was not (or at least was not thought to be) a general certifying organization, why must it develop a specification for, or somehow "certify," a competitor's quite different product? After all, General Motors need not certify the quality of a Toyota, nor need a group of film producers certify the quality of competing live television programs.

b. Clamp-All argues that CISPI defendants prevented an important "standard-setting and approval-granting" organization, the American Society of Sanitary Engineers ("ASSE"), from approving a hubless coupling performance standard that would have benefited Clamp-All. In theory,

one can understand how joint activity of the kind Clamp-All alleges could be unreasonably anticompetitive. Suppose, for example, the ASSE was about to adopt a performance standard that both CISPI and Clamp-All could have met; suppose further that ASSE's adoption of such a standard would have led to the adoption of a similar standard by hosts of local and state regulatory, and private certifying authorities. Then Clamp-All simply could have pointed to the standard (and its compliance) to show a contractor that its product was approved, just as CISPI does in states that have referenced the 310 Designation. If CISPI prevented the adoption of such a standard, it *may* have acted unreasonably.

The key word here, however, is "may." Certifiers may reasonably believe that they can do their job properly (a job that benefits consumers) only if all interested parties are allowed to present proposals, frankly present their views, and vote. Thus, we do not see how plaintiff could succeed on its antitrust claim unless (at a minimum) CISPI *both* prevented ASSE from adopting a national performance standard that would have benefitted Clamp-All *and* did so through the use of unfair, or improper practices or procedures. *See Indian Head, Inc. v. Allied Tube & Conduit Corp.*, 817 F.2d 938 (2nd Cir.) (antitrust claim stated where defendant conspired with other steel companies to block the approval of plaintiff's product by a national certifying organization; defendant acted within the letter of the organization's rules, but violated their spirit by paying for and packing a meeting with voters who had little to no professional interest in the subject matter), *aff'd*, No. 87-157 (U.S. Sup. Ct. June 13, 1988) (affirming denial of *Noerr-Pennington* immunity for defendant's effort to influence *private* standard-setting organization; dismissing certiorari in respect to whether defendant's conduct was an unreasonable restraint of trade). In deciding whether this is so, courts must take account of the importance of permitting parties to express their views freely before reg-

ulatory authorities. *See Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of America v. Pennington*, 381 U.S. 657, 670 (1965) ("Joint efforts to influence *public* officials do not violate the antitrust laws even though intended to eliminate competition" (emphasis added); *cf. Allied Tube & Conduit Corp. v. Indian Head, Inc.*, No. 87-157 (U.S. Sup. Ct. June 13, 1988) (efforts to influence *private* standard-setting organizations *may* violate antitrust laws).

The record here does not contain evidence sufficient to warrant presenting Clamp-All's claim to the jury. It shows that in 1979, at Clamp-All's request, the ASSE formed a subcommittee to write a hubless coupling standard. Clamp-All proposed a four-tier standard (rating couplings by their ability to withstand varying levels of water pressure). Initially, when only one CISPI representative was present, the subcommittee recommended a three-tier standard (which was also beneficial to Clamp-All). CISPI then decided to offer a single tier standard, which both the CISPI and Clamp-All couplings would have met. It wrote its members and urged them to attend the next meeting. At that next meeting, with six CISPI members attending out of a total of sixteen, the subcommittee changed its mind and voted for CISPI's proposed standard. The ASSE eventually decided not to accept its subcommittee's recommendation, and it took no further action.

We can find no concrete evidence in the record that CISPI acted improperly. The record here is unlike that in *Indian Head*, where the defendant "packed" the meeting by hiring lay voters in numbers that unfairly gave it overrepresentation. Nor is there concrete evidence that the submission of CISPI's proposal caused (or even influenced) ASSE's decision not to adopt any standard. Clamp-All points to a single statement by CISPI's general counsel that the CISPI one-tier proposal was "not really a performance standard." We do not see how that statement shows a significant abuse of ASSE's procedural standards

or practices. Rather, as far as the record is concerned, CISPI acted within the letter and the spirit of the ASSE rules in presenting its proposal and urging its members to attend the meeting.

B

Clamp-All claims that the defendants have jointly engaged in several unreasonably anticompetitive "business practices." For the most part these claims amount to charges of state-law business torts, not violations of the federal antitrust laws. *Whitten*, 508 F.2d 560-62. We assume that point aside, however, for the sake of argument, and because of appellant's later Lanham Act claim, *see* pp. 31-34, *infra*. We have examined the evidence in respect to each alleged act, and we conclude that no reasonable jury could find a significant, unreasonably anticompetitive business practice that harmed Clamp-All.

a. Appellants say that CISPI marketed its trademarked pipe, fittings, and couplings together as a system, thereby deceptively suggesting that Clamp-All's coupling would not fit the system. The evidence appellant presented to show deception consisted of an advertisement that said:

> You cannot afford to use any other coupling but the CISPI stainless steel couplings for a COMPLETE ℄ NO-HUB system.

We have no reason to believe that CISPI's advertisement was significantly misleading in the industry context. This language is of a kind characterized in *Whitten*, 508 F.2d at 556, as mere "sellers' talk." Moreover, CISPI aimed the advertisement at a technical audience, which would likely know enough not to find it significantly misleading in respect to whatever suggestion it might have made that Clamp-All's coupling would not fit the "system." (See the discussion under 'e' below.) We do not see how a jury, without more evidence than this vaguely worded advertisement, could find otherwise.

b. Appellant says that CISPI advertises its collective mark, Ⓖ NO-HUB, as a sign of quality, but, in fact, that advertising is deceptive because CISPI does not control the quality of the product. Clamp-All adds that there are "numerous examples of defective products bearing the Ⓖ NO-HUB trademark."

The record, however, contains only evidence of failures of CISPI *fittings* (curved pieces of pipe used to change the direction of the flow); it does not contain any evidence of any failure of any CISPI *coupling*. Appellant points to a Davidson Laboratory test as evidence, but that test shows that Clamp-All's more expensive coupling withstood strong water pressure more successfully than CISPI's; it did not show that CISPI's coupling was defective. Given the evidence, the logical links between "defective fittings," "no quality control," and "deceptive trademark use" in respect to coupling sales are too farfetched to warrant submission to the jury.

c. Clamp-All says that CISPI published test results favorable to its products but did not publish unfavorable test results. But the law, as far as we are aware, does not automatically require a firm to publish unfavorable test results.

Clamp-All adds that the favorable report—the PTL report—was misleading. The district court did not permit appellant to introduce that report, however, because it said the jury would not understand its significance without the help of an expert (and appellant had not designated an expert to testify about the report). We confess that we cannot understand the relevance of Clamp-All's complaint about the report. (It has something to do with the fact that the report explained that the ends of the pipes used in the test were "uncoated," but it did not explain that the ends were "machined off"). Our own inability to understand the relevance of Clamp-All contention leads us to conclude that the district court acted well within its

powers in not admitting the report without expert explanation. *See* J.Weinstein & M. Berger, 3 *Weinstein's Evidence* ¶ 702[02] and cases cited at 702-9 n.3 (1987)

d. Appellant says that CISPI members sometimes used the wrong trademark: they used the words "NO-HUB" instead of "Ꝙ NO-HUB." The only evidence that this is so, however, consisted of two of the defendants' price lists where the words "NO-HUB" appeared. The district court, noting that the lists contained all sorts of errors, concluded that this evidence would not permit a jury to find an intentional use of the wrong mark. We believe the court was correct.

e. Clamp-All says that CISPI improperly injured its reputation, first, by delivering (on several occasions during a six-month period) defective fittings to a site where contractors were using Clamp-All couplings, and second, by stating (at a press conference) that the Clamp-All coupling does not properly fit the CISPI system. The record presents uncontradicted evidence, however, that defective fittings are fairly common in the industry and that CISPI couplings tolerate common defects in the fittings, but Clamp-All couplings do not. That being so, a jury could not find, on the basis of this evidence, any deliberate plan to sabotage Clamp-All or its reputation, of a sort that could rise to the level of an antitrust violation. *See Whitten*, 508 F.2d at 560-62.

f. Clamp-All argues that CISPI should have allowed it to become a member. CISPI, however, is an association of pipe and fitting manufacturers, some, but not all, of whom also make CISPI couplings. Clamp-All does not make pipe or fittings (or, for that matter, CISPI couplings). There is, therefore, nothing unreasonable about CISPI's not accepting Clamp-All for membership. *See generally* 2 J. von Kalinowski, *Antitrust Laws and Trade Regulation* § 6I.02 (1988) (all members of an industry should be eligible for membership, but membership can be limited, for

example, to "those operating at a certain level in the distribution chain").

We add two final points in respect to Clamp-All's antitrust claims. First, we cannot guarantee that we have found every bit of supporting evidence in the fourteen volumes of record. We have, however, examined the record with care, particularly those parts of it that the parties cited, and we are convinced there is no other evidence that could have made a difference to our conclusion. Second, appellant also brought charges of monopolization and attempted monopolization. 15 U.S.C. § 2 (1982). We have assumed, for the sake of argument, that CISPI manufacturers account for a large share of the coupling industry, but that they do not account for all, or nearly all, its sales. (The district court properly refused to allow plaintiff's expert to present precise market share figures because that expert based his opinion significantly upon a few unmemorialized telephone calls, and estimated the reliability of his model as between "1 percent and 99 percent," Fed. R. Evid. 403; *see, e.g., American Bearing Company, Inc. v. Litton Industries, Inc.* 540 F. Supp. 1163 (E.D. Pa. 1982), *aff'd*, 729 F.2d 943 (3rd Cir.), *cert. denied*, 469 U.S. 854 (1984).) That being so, the same reasons that have led us to find appellant's case inadequate in respect to the unreasonableness (or anticompetitive tendencies) of its § 1 "anticomeptitive practice" claims and its pricing claims, lead us to conclude that it could not show "exclusionary conduct" in respect to its monopolization or attempted monopolization claims *See* 3 Areeda & Turner ¶ 626 at 83, *cited in Barry Wright*, 724 F.2d at 230.

IV

The appellant's complaint also asserted a violation of § 43 of the Lanham Act, 15 U.S.C. § 1125(a) (1982), which reads, in relevant part, as follows:

> Any person who shall affix, apply, or annex, or use in connection with any goods or services, a false designation of origin, or any false description or representation, . . . shall be liable to . . . any person who believes that he is or is likely to be damaged by the use of any such false description or representation.

The complaint alleged that "defendants have used false descriptions or representations in connection with the sale of hubless couplings." The district court dismissed this count of the complaint on the ground that this circuit's previous opinions have narrowly interpreted the Lanham Act to apply only to those sorts of unfair business practices or false statements that "are of the same economic nature as those which involve infringement or other improper use of trade-marks," *e.g.*, palming off one's goods as those of another. *Samson Crane Co. v. Union National Sales, Inc.*, 87 F. Supp. 218, 222 (D. Mass 1949), *aff'd per curiam*, 180 F.2d 896 (1st Cir. 1950); *see also Litton Systems, Inc. v. Whirlpool Corp.*, 728 F.2d 1423, 1444-45 (Fed. Cir. 1984); *Quabaug Rubber Co. v. Fabiano Shoe Co.*, 567 F.2d 154, 160 (1st Cir. 1977) ("The basis for an action under this section is use of a mark in interstate commerce which is likely to cause confusion or to deceive purchasers concerning the *source* of the goods [(emphasis added)]."

Appellant concedes it cannot meet this standard. But it notes that other circuits have adopted more liberal views of the statute, some indicating that it in essence creates a private right of action for ordinary "false advertising." *See U-Haul International, Inc. v. Jartran, Inc.*, 681 F.2d 1159 (9th Cir. 1982); *Johnson & Johnson v. Carter-Wallace, Inc.*, 631 F.2d 186 (2nd Cir. 1980); *L'Aiglon Apparel, Inc. v. Lana Lobell, Inc.*, 214 F.2d 649 (3rd Cir. 1954); *see generally* 2 J. McCarthy, *Trademark and Unfair Competition* § 27:4 (2nd ed. 1984). Appellant also points to cases where we have cast doubt on the validity of *Samson Crane*. *See Pignons S.A. de Mecanique v. Polaroid Corp.*, 657 F.2d

482 (1st Cir. 1981) (plaintiff sought overturning of *Samson Crane*; court acknowledged merit of plaintiff's position, but declined to express an opinion); *Electronics Corporation of America v. Honeywell, Inc.*, 487 F.2d 513, 514 (1st Cir. 1978) ("in relying on the district court opinion, we do not indicate necessary agreement with its conclusion that palming off is not an essential element of a Lanham Act claim"); *see also Camel Hair and Cashmere Institute of America, Inc. v. Associated Dry Goods*, 799 F.2d 6 (1st Cir. 1986) (harm is of traditional "protection of proprietary mark" variety, but does not involve palming off). Appellant asks us to reconsider the validity of *Samson Crane* in light of our, and other circuits', subsequent cases.

After examining the record, however, we have concluded that this is not an appropriate case in which to reconsider the validity of *Samson Crane*. Appellant had an opportunity to present its "false advertising" evidence in support of its antitrust claim, and we assume it did so. *See* pp. 27-28, *supra*. In light of that evidence, we believe it undesirable to prolong the case, for, even were we to reconsider *Samson Crane* and remand, it seems unlikely that appellant could win its action. We therefore continue to assume the validity of *Samson Crane*, and postpone its reconsideration for another day.

Finally, we affirm the pretrial dismissal of defendant American Brass & Iron Foundry on jurisdictional grounds for substantially the reasons noted by the district court. Appellant makes various other claims, which we find completely without merit. The judgment of the district court is

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 87-1697

CLAMP-ALL CORP.,

Plaintiff, Appellant,

v.

CAST IRON SOIL PIPE INSTITUTE, ET AL.,

Defendants, Appellees.

Before

CAMPBELL, Chief Judge,
COFFIN, BOWNES, BREYER, TORRUELLA and SELYA,
Circuit Judges.

ORDER OF COURT

Entered: August 4, 1988

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be hereby denied.

By the Court:

Francis P. Scigliano

Clerk

Opinion of the Court

[Whereupon, the jury entered the courtroom.]

THE COURT: Please be seated.

Let me first thank you for your patience, not that you had much choice. But in the end, I think it was best to keep you waiting as I did.

When the plaintiff in a case finishes presenting his, its, or her evidence, the other side then usually files what we call motions, which are requests of the Court to make certain rulings. One of these motions, usually, is a motion to direct a verdict for the defendant; that is, a motion asking the Court to tell the jury that it must find for the defendants because, for various reasons, the evidence is insufficient in law for the jury to be permitted to find for the plaintiff. Such a motion was made here; and there were other motions, as well, to strike certain testimony on the grounds that it did not fit within the rules under which we work.

It seemed appropriate to me, since you have waited these last almost three hours, four, almost four hours, that you be here when I announce the rulings on these various motions so that you also could understand why it's taken so long. Part of the time, we spend hearing argument on the motions; and part of the time I spent considering the arguments and the evidence that had been presented.

The first motion that the defendants made was to strike all of the testimony of Dr. Brown on various grounds, but the primary one being that it was based on assumptions that were unsupported in the evidence. And in particular, there was some testimony in which Dr. Brown described the respective shares of the market of Clamp-All and CISPI. And you may recall, yesterday was one of the many times when we had a conference at the sidebar, after Dr. Brown had testified concerning telephone calls he made to find out how many Mage couplings and how many Mis-

sion couplings were sold. I ruled out evidence at that point of market shares. The telephone calls cannot form the basis for an opinion given to you where we have no way of testing the accuracy of the telephone calls; there's simply no way to do that because the other person on the other line isn't here. In addition to that, there were assumptions concerning price and the conversion of units to prices. So, I had ruled that testimony out yesterday.

However, there was left in Dr. Brown's testimony some statement concerning market share. That has to go, too. Although we know that CISPI has X dollars of sales, and Clamp-All has Y dollars of sales, and Anneco Z dollars of sales, we do not know who else is out there, and whether it's a number of very large people or very small people. And therefore, we know nothing about so-called market share, except as to these three. We do not know the market as a whole. Therefore, what we do know about the three doesn't help us very much. So, that testimony will go out for the reasons I stated yesterday and I've just explained.

It seems to me that the rest of Dr. Brown's testimony is appropriate because it is based on his education, it is based on his experience as an economist; and the science or art, if you will, of economics focusses on behavior. It is one of the things that economists regularly do. So, when he talks about behavior, economic behavior, that is an entirely appropriate thing for an economist to do. He's not there relying on unproven assumptions, as he does when he talks about particular market share in this case.

There was also a motion, a request, to strike the evidence concerning the improper positioning lugs that were found on some fittings in Ohio, maybe in California, and maybe in Florida. Apart from the evidence that there were these instances of defective fittings during a very finite, relatively small period of time, the only evidence to support the assertion that these problems occurred pursuant

to a conspiracy is the hearsay statement of a sales representative. The plaintiff also asked me to consider a statement of Mr. Bailey, which was in 1981, and the lug incident occurred in 1983. Clearly, the Bailey statement is unrelated to the lug incident. And something about the B-dimension, which I must confess I do not yet fully understand, which also goes back, to 1978, and therefore is unrelated to the lug incident.

It seems to me that Mr. Shoupe's statement, even with the fact that there were defective fittings, is simply inadequate evidence to permit you to consider this question as a bad act. It is simply inadequate for you to infer from that that this incident occurred pursuant to a conspiracy to do in the plaintiff.

There was a third motion to strike all of the evidence concerning ASSE. That is denied, but I will deal with ASSE on the merits.

There were two claims in the case, two essential claims, under two sections of the statute, which you will remember from the instructions I gave you at the beginning of the case. And let me start with the second one. Under Section 2 of the Sherman Act, the plaintiff has to show that one or more of the defendants attempted or two or more of the defendants conspired to monopolize the relevant market; that they did so with an intent to monopolize and by predatory conduct, and that there was a dangerous probability of success.

Given that the evidence concerning market share is not in the case, there is simply no evidence of respective market shares, even assuming that the product market is hubless couplings, not just heavy duty ones but all couplings and assuming the relevant geographic market is the national market. There is just no evidence of market share and, therefore, no evidence of monopoly power and dangerous probability of success. So, with respect to the Sec-

tion 2 claim, the motion for directed verdict is for these reasons allowed.

Section 1 is a little more complicated. Here the plaintiff has to show a contract, combination, or conspiracy to unreasonably restrain trade. That means that the plaintiff has to show that the defendants combined to engage in conduct that had a substantially adverse effect on overall competition. It has to show the combination, the bad acts, injury to competition flowing from the bad acts, and injury to the plaintiff flowing from the bad acts.

With respect to the first, combination, I do believe the evidence is sufficient so that you could find, a reasonable jury could find, that these defendants got together. They did, after all, go to the CISPI's meetings and they made joint decisions about how to deal with the couplings. So, I think there is no question that you could find that there was a contract, combination, or conspiracy in the words of the statute.

The bad acts are a more difficult problem. First, the plaintiff claimed that the defendants restrained trade in connection with their conduct with ASSE. You may recall that that's the organization in New York. Let me just backtrack for a moment. With respect to ASSE, the defendants claim not only is the evidence insufficient, but they also say that it happened so long ago that the time that the lawsuit was brought was too late. We would say that the action was filed beyond the Statute of Limitations. Given that the claim is for conspiracy, that the underlying issue is conspiracy, it's not at all clear to me that the Statute of Limitations has run—I don't think it has, frankly.

But with respect to ASSE, the jury could find, you could find, that the defendants, jointly, attempted to block the plaintiff's proposal. And you could find that they did that by packing the subcommittee and by submitting their counterproposal. But there is an absence of evidence of bad

faith in the CISPI submission. It is certainly true that Mr. Harrell has talked about the plus or minus one inch, but there is more to that paragraph. And there is no evidence before us by which we could judge what that standard really means. Therefore, there is no way in which we could judge whether it is a good- or a bad-faith performance standard. Apart from the absence of evidence of bad faith in that submission, the facts viewed most favorably to the plaintiff show that the subcommittee accepted and the parent body rejected CISPI's proposal. You may remember that the subcommittee finally said, Okay, we'll go along with CISPI's proposal. But then, when it went to the full committee, then nothing happened. The whole thing went away.

First, the CISPI proposal did not exclude the plaintiff. The CISPI proposal, as written, as best as I can understand it, would include the Clamp-All coupling; it would not exclude it. Second, there is no evidence of CISPI's causing the committee to reject the subcommittee's recommendation. We don't know how that came about. We don't know whether CISPI did it or the plaintiff did it or or who did it; it could have been anybody else.

Third to the extent that the plaintiff was thereby deprived of a national standard, the evidence does not permit attribution of that deprivation to the defendants. You may recall, Clamp-All keeps saying: If we had a national standard, then, our life would a great deal easier. It wanted to get this national standard by getting the ASSE proposal, but we don't know how it came about that ultimately was not done. So, we can't say it was the defendants who did it. That is, even if CISPI had done nothing, there is no evidence that the committee would have accepted the plaintiff's standard.

In addition to that, there is no evidence that any code bodies would have accepted the ASSE standard. Therefore, there is also no evidence of any injury to competition or

injury to the plaintiff as a result of what happened at ASSE.

There were some other bad acts that the plaintiff said the defendants engaged in, and they have to do with the CISPI Standards 310 and 301. I think that on the evidence that you heard, you could believe Dr. Brown that such a standard is anticompetitive because it is a national standard of quality, widely promulgated and accepted, to which the plaintiff was denied access. There is evidence, I don't know whether you, in fact, saw it, but there are letters in the file that you would see if you had to deliberate on your verdict that Mr. Foresta tried. Indeed, I think he testified, he tried to be included in the CISPI standard, and they said: No, you're not a member; and, therefore, you can't, and you can't become a member because you don't manufacture cast iron soil pipe.

The question remains, however, whether what happened was an unreasonable restraint on trade. It was anticompetitive if you accept Dr. Brown's testimony, but was it an unreasonable restraint of trade? There is no quantitative evidence from which a jury could judge the effect of defendant's conduct and, therefore, whether it was an unreasonable restraint of trade. According to Dr. Brown, the standard creates a situation whereby all the couplings other than CISPI face a barrier to entry but CISPI does not.

Given the fact that the plaintiff was able to gain access wherever he sought, albeit at a cost, and given that the cost, according to evidence, was only the time of Mr. Foresta and the additional amount payable to spec reps as opposed to shelf reps, and given the fact that others also penetrated the market and that there is no evidence that they were limited in gaining entry, the evidence as a whole does not, in my judgment, permit the inference that such restraint as may have existed was an unreasonable restraint.

The plaintiff also complains of certain joint marketing strategies that included this 310-82 Standard. I do not think that that can be found to be an unreasonable restraint. Joint marketing is something that is permitted under the antitrust laws.

There was testimony, and there are documents in evidence, concerning the use of the NO-HUB trademark. That is, on a couple of price lists, there are the words NO-HUB with a little "R" in a circle. The little "R" in the circle means it's a registered trademark. There is no such registered trademark as NO-HUB. And the plaintiff says that was designed to cause the purchaser of cast iron soil pipe to think that this was a whole system and only the CISPI coupling would work with it. But the evidence we have as to that is only price lists by, I think, Eastern and U.S. Pipe. And there is no evidence that that was intentional. If you would look at these—they are all mixed and up, and there are all kinds of mistakes in them—there is no evidence that these had any effect on trade whatsoever.

The defective fittings I previously alluded to.

So, because the evidence, viewed as a whole, does not, in my judgment, permit a reasonable jury to find either an attempt or a conspiracy to monopolise trade in this market and because you could not as a matter of law find a conspiracy to unreasonable restrain trade, I now direct you to find a verdict for all of the defendants in this case. You don't have to do anything more than that, we will by paperwork take care of that.

ASSE Standard No.
1031
Issued:_____

PERFORMANCE REQUIREMENTS FOR

HUBLESS CAST IRON SOIL PIPE COUPLINGS

Sponsored By: American Society of Sanitary Engineering

American Society of Sanitary Engineering
960 Illuminating Building Cleveland, Ohio
44113

PERFORMANCE STANDARD FOR HUBLESS CAST IRON SOIL PIPE COUPLINGS

Foreword

The assurance that a mechanical type joint for use on sanitary and storm drainage systems will not leak, is essential in maintaining safe sanitary conditions and avoiding contamination.

There are three generally accepted and practiced methods in joining cast iron pipe in the plumbing industry.
1. Hot poured lead and oakum joint using hub and spigot pipe.
2. Rubber gasket compression joint using hub and spigot pipe.
3. Coupling assembly using hubless pipe and fittings.

As time progresses, newer and innovative methods and procedures may be introduced to reduce both initial cost as well as installed cost without sacrificing safety, serviceability or reliability.

It is the intent of this standard to establish a minimum performance criteria for coupling assemblies using hubless pipe and fittings which will provide the assurance that the coupling being used will stand up to the service for which it was intended. It is not intended that these standards restrict any manufacturer from providing couplings that may exceed these minimum specifications.

1.1. SCOPE

1.1.1. Class of Couplings

There shall be one class of couplings capable of withstanding tests as required by any or all model Plumbing Codes.

1.1.2. Sizes

Connection pipe and fittings sizes in inches: $1^1/_2$, 2, 3, 4, 5, 6, 8, 10.

1.1.3. Couplings

Couplings conforming to the requirements of this standard are for Gravity drainage systems and designed to operate at pressures not in excess of the equivalent $\pm$ 1 inch water column at the system fixture traps. When installed according to this standard or manufacturer's resommendation, shall be able to withstand all normal test pressure required in the applicable code or Specification.

1.1.4. Temperature Range

The gasket as an integral part of the coupling shall be capable of handling effluents which range in temperature from 40°F. to 210°F.

1.2. PURPOSE

The purpose of the coupling is to join together two sections of hubless cast iron soil pipe and/or fittings manufactured in accordance with CISPI Standard Specification 301-(latest edition) in such a fashion that the joint can withstand those pressures normally required by plumbing codes during installation, test, and service and further will provide the ultimate user with a joint and a coupling that will substantially equal the lifetime of the material with which it is connected.

1.3 DESIGN PRINCIPLES

1.3.1. Application

1.3.1.1. The coupling is intended to be used only for gravity sanitary and vent systems and gravity storm drainage systems.

1.3.2.1. All couplings when properly installed shall be designed to withstand, the stresses developed by the specified test pressure as well as the stresses resulting from both internal and external forces generated under normal operating conditions.

1.3.3. Mechanical Function

1.3.3.1. All couplings shall be made from materials which have a life expectancy as great or greater than that of the pipe and fittings which they join in the same environment.

1.3.3.2. The design shall be such as to provide a watertight seal with the pipe and/or fitting.

1.3.3.3. Couplings shall be designed to allow for adequate expansion, contraction, and deflection of each joint of the piping system. The design of the coupling shall be compatible to the design of the pipe and fittings so as not to interfere with the integrity of the joint.

1.3.3.4 The design of the gasket shall be such that an integrally molded shoulder shall provide an equal socket depth for mating ends of pipe and/or fittings.

1.3.3.5. The design shall be such that flow characteristics of the system shall not be restricted or impeded by any part of the coupling.

1.4 MATERIALS

1.4.1. Reference to A.S.T.M. and A.N.S.I. Standards shall be to the latest edition.

1.4.2. Ferrous cast parts shall conform to A.S.T.M. A126 Class B for grey iron or A.S.T.M. A536 ductile iron.

1.4.3. Non-ferrous cast parts shall conform to A.S.T.M. B61.

1.4.4. Non-ferrous cast parts shall have a corrosion resistance at least equal to A.S.T.M. B504 UNS Alloy C8440 Grade 5A.

1.4.5. Chrome nickel steel shall be in compliance with at least Series 300.

1.4.6. The gasket part of the coupling shall conform to A.S.T.M. Standard C-564.

1.4.7. Material of joint connection when properly supported should not weaken the overall strength or durability of the overall system.

1.5. INSTRUCTIONS FOR MARKING AND INSTALLATION

1.5.1. Marking of Components

The Coupling shall be marked according to the manufacturer's specifications and shall include the following:

1.5.1.1. Name of Manufacturer or Trademark.

1.5.1.2. Size.

1.5.1.3. Patent Number if applicable.

1.5.1.4. "Made in USA" or country of origin.

1.5.2. Each gasket shall have the following information marked with raised letters on its inside surface, but in a position so as to not interfere with the proper sealing function:

1.5.2.1. Name of manufacturer or registered trademark.

1.5.2.2. Size.

1.5.2.3. Patent Number if applicable.

1.5.2.4. Type of material and appropriate ASTM specification number.

1.5.2.5. Mold and cavity number.

1.5.3. Installation Instructions

1.5.3.1. Complete installation instructions must be made available by each manufacturer. These instructions must provide all information necessary to permit correct installation.

1.5.3.2. On all couplings installed, each bolt or nut must be tightened alternately and evenly to the proper torque recommended by the manufacturer using a properly calibrated torque wrench.

SECTION II

2.0. CRITERIA AND PROCEDURES FOR EVALUATION BY INDEPENDENT TESTING AGENCY

2.1. Drawings. Assembly drawings and other data which are needed to enable a testing agency to determine compliance with this standard, together with installation procedures, shall accompany devices when submitted for examination and performance tests under this standard.

2.2. *TEST PROCEDURE* - Unrestrained Pressure Test

2.2.1. *Objective* - The purpose of this test is to observe the performance of the coupling under conditions that may be encountered in the field during the hydrostatic testing of the installed drainage system and/or during a period of use when blockage or surcharged sewers results in exposure of the system to a static head.

2.2.2. *Test Material* - Tests to consist of maximum P.E. to maximum P.E., minimum P.E. to minimum P.E., and maximum P.E. to minimum P.E., and maximum O.D. bead to minimum P.E., dimensions as defined in CISPI 301 (latest edition).

TEST PROCEDURES

A. Test to be conducted:

1. Unrestrained Joint Test with Water
2. Restrained Joint Test with Water
3. Restrained Joint Test using Air Pressure
4. Maximum Deflection Test

B. Using new pipe ends for each test the number of tests to be performed shall be three (3), average results shall be listed for each series of tests.

C. All joint assemblies shall be made in accordance with standard procedures recommended for field installations.

D. Tests shall be performed within 10 minutes of the time joint is completed.

E. For the unrestrained joint test with water, each section of pipe shall be on two "V" blocks.

F. For the restrained test with water, pressure shall be applied at 1 psi per 2 minutes.

G. For unrestrained joint test, increase 1 psi per 5 minutes.

H. For the restrained air and water tests, pipe shall be free to allow for 1/8" movement to insure that the seal is not being formed by pushing the pipe into the sealing ring.

I. The maximum deflection test at 1 psi shall be performed by moving the pipe approximately 1 degree per minute.

J. Use a pressure regulator valve on the inlet side.

K. Certified commercial torque wrenches should also be used. These should be set at the torque recommended for use in field installations.

L. *Leakage* is defined as the first sign of water moving out of joints.

M. *Test End Point* is defined as the total joint separation of .150 for unrestrained tests.

APPENDIX

HANGERS AND SUPPORTS

1. INSTALLATION DETAILS INSIDE THE BUILDING

1.1. The Use of Hangers and Supports.

According to most authorities and plumbing codes, it is sufficient to support horizontal pipe at each joint. Horizontal pipe should be supported at five (5) foot intervals; except that pipe exceeding five (5) feet in length may be supported at ten (10) foot intervals. Supports should be adequate to maintain alignment and prevent sagging and should be placed within eighteen (18) inches of the joint.

When the system is filled with water, sufficient beam strength is provided by cast iron soil pipe to carry the load with hangers every ten feet, depending on conditions or what is regarded as essential by the contractor, architect, or en-

gineer. Whatever method of support is used for the horizontal line, care should be exercised to make certain that the line has a proper grade ($^1/_4$-inch per foot if possible).

Hangers may be fastened to wood members or beams with wood screws, lag screws or large nails. For fastening to 'I' beams, bar joists, junior beams or other structural members, beam clamps or 'C' clamps may be used. Fasteners for masonry walls may be expansion bolts or screws, or where a void is available, the toggle bolt may be used. Studs shot into the masonry by the explosion method may also be used. Along a wall, a bracket made of structural members or a cast bracket may be used.

Adequate provision should be made to prevent "shear." Where components are suspended in excess of eighteen (18) inches by means of non-rigid hangers, they should be suitably braced against movement horizontally, often called sway bracing.

1.1.2. Horizontal Installation of Large Diameter Pipe

[DRAWING]

Horizontal pipe and fittings six (6) inches and larger shall be suitably braced to prevent horizontal movement. This should be done at every branch opening or change of direction by the use of braces, blocks, rodding or other suitable method, to prevent movement.

1.2. Installation of Horizontal Fittings

1.2.1. Hangers should be provided as necessary to provide proper alignment and grade. Hangers should be provided at each horizontal branch connection. Hangers should be adequate to maintain alignment and prevent sagging and should be placed adjacent to the coupling. By placing the hangers properly, the proper grade will be maintained. Adequate provision should be made to prevent shear. Where components are suspended in excess of eighteen (18) inches by means of non-rigid hangers, they should be suitably braced against movement horizontally often called sway bracing.

1.2.2. Closet bends, traps, trap-arms and similar branches must be firmly secured against movement in any direction. Closet bends installed above ground should be stabilized by firmly strapping and blocking. (For information on closet bends installed under concrete slab, see Section 2.3.) Where vertical closet stubs are used, they must be stabilized against vertical or horizontal movement.

1.2.3. When a hubless blind plug is used for a required cleanout, the complete coupling and plug must be accessible for removal and replacement.

1.2.4. The connection of closet rings, floor and shower drains and similar "slip-over" fittings and the connection of hubless pipe and fittings to soil pipe may be accomplished by the use of caulked lead and oakum joints.

1.3 Vertical Piping

Vertical components should be secured at each stack base and at sufficiently close intervals to keep the system in alignment and to adequately support the weight of the pipe and its contents. Floor clamps, sometimes called friction clamps, are required for vertical piping in multi-story structures in order for each floor to carry its share of the load.

If vertical piping is to stand free of any support or if no structural element is available for support and stability during construction, secure the piping in its proper position by means of adequate metal stakes or braces fastened to the pipe. See Section 2 for additional discussion.

2. INSTALLATION OUTSIDE BUILDING AND UNDER SLAB

2.1. Hubless cast iron sanitary systems laid in trenches should be continuously supported on undisturbed earth, or compacted fill of selected material, or on masonry blocks at each joint. If more than one block is needed, mortar should be used to keep the masonry blocks intact. A good sewer starts with a good trench. Proper line and grade is essential. When trenches are dug too deep, it is best to backfill and tamp to grade;

however the piping may be supported on masonry blocks. To maintain proper alignment during backfilling, stabilize the pipe in proper position by partial backfilling and cradling, or by the use of adequate metal stakes or braces fastened to the pipe. Piping laid on grade should be adequately staked to prevent misalignment when the slab is poured.

2.2. Vertical sections and their connecting branches should be adequately staked and fastened to driven pipe or reinforced bars so as to remain stable while backfill is placed, or concrete is poured.

2.3. Closet Bends Under Concrete Slab

Closet bends in concrete slab construction should be stabilized against vertical movement by the concrete slab. If the closet bend is partially cradled or blocked by earth underneath, it is suggested that a brick or concrete block be placed on top of the closet bend to provide a solid contact between it and the underneath side of the slab.

3. GENERAL

When installing a hubless cast iron sanitary system, care should be taken to be sure that the components can be readily identified. When laying pipe in a ditch, the identification shall be on the top side of the pipe. When in the walls, the identification should be on a side readily visible to the Inspector.

Good plumbing starts with good planning. It is best to have a plan view, drawn to scale, accompanied with an isometric view to show all fittings and pipe in their relative position. If accurate drawings are not available, a free-hand sketch will be of much value and should be made.

All installation should be made and supported in a workmanlike manner satisfactory to the Plumbing Inspector.

No. 88-725

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In the
Supreme Court of the United States

OCTOBER TERM, 1988

CLAMP-ALL CORPORATION,
PETITIONER,

v.

CAST IRON SOIL PIPE INSTITUTE, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FIRST CIRCUIT

Respondents' Brief in Opposition to Petition for a Writ of Certiorari

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Respondents' Brief in Opposition to Petition for a Writ of Certiorari

Respondents the Cast Iron Soil Pipe Institute ("CISPI"), Anaheim Foundry Company, Charlotte Pipe & Foundry Company, The Eastern Foundry Company, Jones Manufacturing Company, Inc., and United States Pipe and Foundry Company, Inc. oppose the petition of Clamp-All Corporation ("Clamp-All") for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case. In opposition to Clamp-All's petition, respondents jointly file this brief.

Argument

PETITIONER'S ARGUMENTS RELATE ONLY TO THE SUFFICIENCY OF ITS TRIAL EVIDENCE, A MATTER ALREADY EXAMINED AT LENGTH AND NOT WORTHY OF CERTIORARI IN THIS "HIGHLY FACT-BASED" CASE

Petitioner seeks a grant of certiorari to obtain further review of what petitioner asserts are two aspects of the rulings below: (1) a "presumption" the Court of Appeals allegedly adopted with respect to the antitrust implications of a private product standard, and (2) the determination that petitioner's trial evidence in this "highly fact-based" case was insufficient to survive a motion for a directed verdict at the close of petitioner's case, Petitioner's Appendix ("Pet. App.") 2a. As respondents detail below, the "presumption" that petitioner finds in the First Circuit's opinion is a creature of petitioner's own misreading of that opinion. The only ruling on this point, by both the trial court and the First Circuit, was that petitioner's evidence, examined in accordance with hornbook antitrust standards, was simply insufficient.

Once petitioner's first argument is properly framed, it is apparent that both issues raised by petitioner relate to nothing more than the sufficiency of the evidence. The writ of certiorari exists to resolve substantial federal and constitutional questions, not to afford a petitioner yet a third opportunity to convince a court that somewhere in the trial record can be found sufficient evidence on some contention to warrant consideration of the issue by a jury. The petition should be denied and this protracted, burdensome proceeding brought to an end.

A. The First Circuit Adopted No "Presumption" Regarding Private Product Standards

In an effort to raise an issue other than the sufficiency of the evidence, petitioner asserts that the First Circuit adopted a "new rule of per se legality for private standards that exclude competing products." Petition at 8. A review of the First Circuit's opinion reveals that it adopted no such rule. To the contrary, the court simply applied orthodox rule of reason analysis to the evidence submitted at trial concerning a private standard established by CISPI, CISPI Designation: 310. The court stated: (i) that " 'legitimate' standard-setting activity" has competitive benefits; (ii) that a plaintiff is entitled to adduce evidence that "the standard setting at issue serves no legitimate purpose, or . . . is unnecessarily harmful" and (iii) that *petitioner submitted insufficient evidence* to raise a triable issue concerning its assertions. Pet. App. 15a-16a. Stated simply, petitioner's claim failed at trial, not because some novel liability or evidentiary standard was applied, but because petitioner failed to back up its allegations with cognizable evidence.

Moreover, far from applying a *per se* rule or "presumption," as petitioner contends, Petition at 7, 8, the court carefully analyzed the *evidence in the record*, including the following:

(a) The private standard at issue was created, not by a "general certifying organization," Pet. App. 16a, but by a private trade association, CISPI, in order to establish a generic denomination which would allow purchasers "to determine whether a particular coupling is, in fact, (generically considered) a CISPI coupling." Pet. App. 14a.

(b) The standard, *on its face*, advises users of the existence of competing products and disavows any commentary on such competing products. Pet. App. 14a, 16a.

(c) There was "*no testimony*" (emphasis added) that buyers of the product, "builders, plumbers or contractors — reason-

ably sophisticated users," Pet. App. 16a, were in any respect misled into thinking that the respondents' trade association was a "general certifying organization" whose failure to certify petitioner's "quite different product" reflected adversely or otherwise on that product. Pet. App. 16a.

In sum, it is petitioner that, having no evidence to support its claim, is seeking the adoption of a *per se* rule. The ruling of the First Circuit creates no new issue of law for this Court to review. Petitioner's first argument, like its second contention, does no more than invite this Court to review and redetermine the sufficiency of the evidence.

B. Petitioner's Contentions Were Fully and Properly Considered Below; Further Review Is Unwarranted

Petitioner's "fourteen volumes of record," Pet. App. 22a, have now been reviewed, in detail, by two courts. The opinions below are noteworthy for their patient and painstaking efforts to review the facts in support of each of petitioner's scattershot allegations and for their thorough explanations as to how, for each allegation, petitioner's proof fell short.

The District Court, Zobel, J., presided over thirteen days of jury trial of petitioner's case. Through the course of the trial, the District Court became intimately familiar with the evidence submitted by petitioner and the inferences that petitioner argued could reasonably be drawn therefrom. The District Court's opinion establishes that it employed the proper standards for ruling on the motion for directed verdict, Pet. App. 31a-33a, and that its ruling was well-reasoned, fully grounded in the record, and correct.

The Court of Appeals then afforded petitioner a second comprehensive review of its facts and contentions. Contrary to the conclusory assertions in the Petition, the appellate court

employed the proper legal standard, "assum[ing] a set of facts as favorable to Clamp-All, in respect to each charge, as the evidence will reasonably permit." Pet. App. 4a. Its analysis of the facts, which reflects an extensive review of the record, reaches the only possible conclusion — that sufficient evidence of an antitrust violation was not submitted.

Absent exceptional circumstances, this Court will not review lower court rulings on the sufficiency of the evidence. *Houston Oil Co. of Texas* v. *Goodrich*, 245 U.S. 440, 441 (1918). The sufficiency of the evidence adduced by petitioner is a subject of interest only to the litigants herein, and thus does not present a question worthy of consideration by this Court. *See Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 79 & n.2 (1955); *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393 (1923). Moreover, this Court has consistently declined to undertake what is essentially a fact-finding or fact evaluation mission where two courts below, in accordance with the proper legal standards, have reached concurrent conclusions. *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949).[1] Because petitioner's claims have been fully aired in prior proceedings, and in light of the well-established and prudent practice of this Court not to grant further review to insular controversies over the sufficiency of the evidence, no writ of certiorari should issue.[2]

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[1] At various points, petitioner asserts that the jury was not permitted to hear certain evidence. Petition at 4, 11. Petitioner has confused the issue of admissibility of evidence with the issue of sufficiency of evidence. The lower courts ruled that the admitted evidence, taken together, simply did not afford a basis upon which a reasonable jury could find an antitrust violation, and that entry of a directed verdict was therefore appropriate. *See Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 250-52 (1986).

[2] Because respondents do not view this Court as being an appropriate forum for a point-by-point reargument on the significance of the facts heard below, respondents do not attempt herein to reply to each factual assertion contained in the Petition. Respondents' failure to quarrel herein with any particular

C. The Courts Below Were Correct in Ruling That Petitioner's Evidence Was Insufficient

Outside of the ruling as to the competitive significance of CISPI Designation: 310, which is addressed above, petitioner challenges the lower court rulings as to the sufficiency of the evidence on three issues: (1) the American Society of Sanitary Engineers ("ASSE") proceedings; (2) respondents' advertising; and (3) market power. As to each issue, it is plain that petitioner has either misunderstood, misconstrued or simply ignored the opinions and evidence below.

1. *The ASSE Proceedings*

As set forth in the opinions below, the ASSE, a standard-setting organization in the plumbing field, formed a subcommittee to write a standard for a product, the hubless coupling, which was marketed by both petitioner and respondents. Pet. App. 18a. Both petitioner and CISPI submitted proposed standards to the subcommittee. *Id*. CISPI's proposed standard was never alleged to have excluded petitioner's product. Pet. App. 18a, 31a. CISPI's proposed standard was accepted by the subcommittee and forwarded to the ASSE. The ASSE rejected CISPI's proposal and decided not to adopt *any* standard. Pet. App. 18a.

The Court of Appeals ruled that there was "no concrete evidence in the record that CISPI acted improperly" with respect to the ASSE. Pet. App. 18a. Petitioner asserts that it did have such evidence in two respects. First, it characterizes CISPI's proposal as being so meaningless as to constitute a bad faith proposal. Second, it asserts that CISPI "packed" the meeting at which the parties' proposals were voted on.

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statement made in petitioner's Statement of the Case should not be misconstrued as agreement therewith; in fact, respondents view much of petitioner's Statement of the Case as being incorrect and unsupported by the record.

These assertions were properly viewed by the courts below as not being supported by evidence sufficient to take this claim to the jury. With respect to the nature of CISPI's proposed standard, the trial court ruled, *inter alia*, that there was "*no evidence* before us by which we could judge what that standard really means." Pet. App. 31a (emphasis added).[3] More fundamentally, the First Circuit ruled that, whether CISPI's standard was good, bad or indifferent, there was no evidence that the standard had any *effect* on petitioner because there was "no[] . . . concrete evidence that the submission of CISPI's proposal caused (or even influenced) ASSE's decision not to adopt any standard." Pet. App. 18a. With respect to the purported "packing" of the meeting, the First Circuit concluded that the jury could not find unfair overrepresentation by CISPI where the record evidence showed, *inter alia*, that only six of the sixteen ASSE subcommittee members were CISPI members. Pet. App. 18a. In these circumstances, petitioner's analogy to *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, 486 U.S. , 108 S. Ct. 1931 (1988), is inapt. The First Circuit properly applied *Indian Head* to the facts herein and found no antitrust violation.[4]

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[3] Footnote 19 to the Petition addresses the arcane issue of whether CISPI's proposal constituted a "performance standard." The footnote provides a plain illustration of the technical issues with which the trial court was confronted without any expert testimony to aid it. Even now, petitioner relies in footnote 19 on evidence which it admits was excluded at trial, despite the fact that petitioner took no issue with that evidentiary ruling, either on appeal or in its instant petition.

[4] Moreover, *Indian Head* addressed the applicability of *Noerr-Pennington* protection for private lobbying efforts; it expressly did not reach issues as to the illegality of the substantive petitioning conduct involved in the case. 108 S. Ct. at 1936 & n.3. *Indian Head* is not pertinent to this case because neither the district nor the appellate court relied upon any constitutional privilege in their rulings as to the ASSE proceedings. Pet. App. 16a-19a; 30a-32a. Both courts found against petitioner with respect to this issue because petitioner did not come forward with sufficient evidence to raise a triable issue under the antitrust laws.

2. *Respondents' Advertising*

Petitioner alleged that CISPI advertised the CISPI coupling as being superior to competing products and that these advertised claims of superiority were false. The Court of Appeals ruled that, "without more evidence," mere claims of product superiority, especially when made to a "technical audience," were "mere 'sellers' talk.'" Pet. App. 19a.[5] The First Circuit further held that there was insufficient evidence to allow a jury to find that this advertisement was false. With respect to petitioner's claim that various product failures proved the falsity of respondents' assertions of superiority, the Court of Appeals stated that the record contained no evidence of failures of hubless couplings, but only evidence of failures of other of respondents' products. Pet. App. 20a. Petitioner's evidence that its product out-performed respondents' product in a particular laboratory test was also deemed insufficient because findings as to the relative performance of the two couplings "did not show that CISPI's coupling was defective." Pet. App. 20a.

3. *Market Power*

Petitioner alleges that the testimony of its expert that CISPI and its members had market power was sufficient to warrant submission of the market power issue to the jury. Petitioner fails to note that this testimony was left totally lacking in foundation when the trial court excluded the expert's entire analysis of market share because the expert "based his opinion significantly upon a few unmemorialized telephone calls, and

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[5] The First Circuit also stated that it viewed the false advertising claims as constituting "charges of state-law business torts, not violations of the federal antitrust laws." Pet. App. 19a. However, the court "assume[d] that point aside" and treated the false advertising allegations on their merits. *Id.*

[admitted to] estimat[ing] the reliability of his model as between '1 percent and 99 percent.'" Pet. App. 22a. The trial court's exclusion of this evidence was, as the Court of Appeals held, entirely proper.[6]

[6] Petitioner's argument that respondents' market power may be proven merely by regarding the difference between the parties' respective market shares in Massachusetts and their market shares in the rest of the country is plainly flawed. As the Court of Appeals pointed out, petitioner controlled about 65 percent of the coupling market inside Massachusetts, "where Clamp-All had a monopoly for several years because only its coupling met the state's performance standard." Pet. App. 4a.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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November, 1988

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Appendix A

STATEMENT REQUIRED BY RULE 28.1

1. *Anaheim Foundry Company*

Anaheim Foundry Company has no parent companies, affiliates or subsidiaries.

2. *Cast Iron Soil Pipe Institute*

The Cast Iron Soil Pipe Institute has no parent companies, affiliates or subsidiaries.

3. *Charlotte Pipe & Foundry Company*

Charlotte Pipe and Foundry Company, N.E.
Charlotte Pipe and Foundry Company, S.W.

4. *The Eastern Foundry Company*

Peerless Heater Company
Peerless Industries, Inc.

5. *Jones Manufacturing Company, Inc.*

Clearbrook, Inc.
J.P. Manufacturing, Ltd.
Jones Acquisition, Ltd.
The Jordan Company

6. *United States Pipe and Foundry Company, Inc.*

Hillsborough Holdings Corporation
Apache Holdings Corporation
Basins, Inc.
Basins of Toledo, Inc.
Best Insurors, Inc.
Best Insurors of Mississippi, Inc.
Black Warrior Methane Corporation
Black Warrior Transmission Corporation

Broadnax Jewelry Company
Casting Holdings Corporation
Celotex Inoue (Japan) Corporation
Cherokee Holdings Corporation
Coast to Coast Advertising, Inc.
Computer Holdings Corporation
D.J. Dinsmore Co.
Dixie Building Supplies, Inc.
The Georgia Marble Company
The Georgia Marble Land Company
Hamer Holdings Corporation
Homes Holdings Corporation
JW Aluminum, Inc.
JW Resources Holdings Corporation
JW Window Components, Inc. (DE.)
JWI Holdings Corporation
J.W. Walter, Inc. (DE.)
J.W. Walter, Inc. (FL.)
Jefferson Warrior Railroad Company, Inc.
Jim Walter Computer Services, Inc.
Jim Walter Homes, Inc.
Jim Walter Insurance Services, Inc.
Jim Walter Resources, Inc.
Jim Walter Window Components, Inc. (WI.)
Jimco Stone Centers, Inc.
Land Holdings Corporation
Mid-State Holdings Corporation
Mid-State Homes, Inc.
NS Holdings Corporation
Oil Holdings Corporation
Railroad Holdings Corporation
Sanford Holdings Corporation
Shore Oil Company
Sloss Industries Corporation

Southern Precision Corporation
United Land Corporation
U.S. Pipe Realty, Inc.
Vestal Manufacturing Company
Walter Home Improvement, Inc.
Walter Industries, Inc. (2 volumes)
Walter Land Company
Warren Industries, Inc.
Wedlo, Inc.